IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 11/12/2002

Coram

The Honourable Mr. Justice V.S. SIRPURKAR
and
The Honourable Mr. Justice P.D. DINAKARAN

CRIMINAL APPEAL No.91 OF 1997

1. Rajendran
2. Nagammal ..... Appellants

-Vs-

STATE rep. by the
Inspector of Police
Mudis Police Station
(Crime No.137 of 1994) ..... Respondent

Appeal under Sec.374 Crl.P.C. against the judgment of the
Additional Sessions Judge, Coimbatore in
S.C. No.93 of 1996

!For Appellants :: Mr. K.V. Sridharan

^For Respondent :: Mr. A. Navaneethakrishnan
Addl. Public Prosecutor

:JUDGMENT

V.S. SIRPURKAR, J.

The appellants herein challenge their conviction recorded by the Additional Sessions Judge. The first appellant has been held guilty of the offence under Sec.302 I.P.C. and sentenced to undergo life imprisonment while the second accused, who is the mother of the first accused, has been held guilty of the offence under Sec.498-A I.P.C. and has been sentenced to undergo one year rigourous imprisonment and also the fine of Rs.1000/-.

2. The appeal is nothing but a sordid story of what the newly married girls have to undergo in the name of preserving the marriage. Deceased Vanitha was married to the first appellant Rajendran. Second appellant Nagammal is her mother-in-law. After the marriage, the second appellant kept on pestering Vanitha for bringing three sovereigns of gold from her parents. Vanitha’s family could give only one and a half sovereigns of

gold at the time of marriage though they had agreed to give four and a half sovereigns of gold at that time.

3. The incident took place on 26-10-1994 when Vanitha was residing in the house of the appellants. Vanitha could not go for the work as she was unwell. Perhaps, because her husband was away, there was again bickering between the second appellant and Vanitha on account of the dowry and, therefore, Vanitha complained to her husband after he came back from work. Flared up by this, the first appellant started beating Vanitha as she was given to complaining against her motherin-law. Vanitha, therefore, took her child and started going to her parents' house, which is also situated nearby. However, the child was whisked from her and she was pushed by the first appellant inside the house. Kerosene was poured by him on her and particularly on the head and body and she was set to fire with the aid of a burning lamp. Vanitha was ablaze and started crying for help. She embraced the first appellant only causing him some burn injuries. Prosecution story is that the second accused was through out the incident and she also sped away after closing the doors of the house in order to prevent Vanitha from coming out of the house.

4. Hearing the scream, Mangalam (P.W.1), mother of Vanitha and Madhavan (P.W.2) brother of Vanitha and the other neighbours gathered there. They found that both the accused had run away from their house. Vanitha also came out of the house ablaze. She was immediately rushed to the Government Hospital, Valparai in a van which was brought by Vijayasundaram (P.W.3), younger brother of Vanitha. She was admitted as an indoor patient in the hospital and Dr. Thambiran (P.W.8) started giving her the treatment. He also gave the treatment to the first accused who had gone to the hospital at about 11.00 p.m. on the same day. The first accused had reported to the doctor that when he attempted to save the life of his wife who had set herself to fire, he himself had sustained burn injuries. He did not, however, agree to admit himself in the hospital as an indoor patient.

5. Seeing Vanitha having been burnt, Dr. Thambiran (P.W.8) gave the intimation both to the police as well as to the Judicial Magistrate, Valparai. Vanitha was found to have suffered 80% of burn injuries. While being admitted in the hospital, Vanitha had told the doctor P.W.8 that she was set ablaze by her husband after dousing her with kerosene. This was indeed recorded in the accident register (Ex.P-5). The Sub Inspector of Police, Valparai Police Station, who rushed to the hospital, recorded the statement of Vanitha at about 12.15 a.m., which was marked as Ex.P-20. The statement was sent through the constable to Mudis Police Station. Kanagasabapathy (P.W.16), Sub Inspector of Police, Mudis Police Station, received the statement at about 1.00 a.m. on 27-10-1994 and registered the crime vide Cr.No.137 of 19 94 for offences under Sec.498-A I.P.C. and Sec.307 I.P.C. The express First Information Report was prepared vide Ex.P-16 and was sent to the concerned Judicial Magistrate. Inspector of Police, Valparai Police Station rushed to the place of occurrence at 8.00 a.m. and made arrangements to have photographs of the place of occurrence. He also prepared the observation mahazar in the presence of the panch witnesses, viz. Ex.P-6 and also prepared the rough sketch. He seized the material objects like woollen blankets,

wooden plank, plastic kerosene can, broken bottle-light, blue colour lid, etc.

6. The second accused was arrested only on 28-10-1994 at about 7.00 a.m. at Sholaiyar Dam Bus Stand. She was also sent for judicial custody. The first accused was already arrested. The Investigating Officer then started the investigation but came to know that Vanitha had died and, therefore, the offence was altered to Sec.302 I.P.C. from Sec.307. The inquest was held. Post-mortem was also conducted. The doctor, who conducted the post-mortem, also opined that Vanitha had burn injuries all over her body.

7. After the investigation was over, the charge sheet was filed and the accused were put to trial after the matter was committed to the sessions court. Before the Sessions Court both the accused denied having treated Vanitha with cruelty and also pointed out that they had no hand whatsoever in the burning of Vanitha. In short, the hint of the defence is that Vanitha had committed suicide or she was accidentally burnt.

8. Before the trial court, the prosecution relied on the evidence of some witnesses, who were relation witnesses and also the neighbours. There was no eye-witness but the circumstantial evidence was in the shape of dying declaration of Vanitha which was proved by the Judicial Magistrate who recorded it. The court also found, relying on the basis of the chemical analyst's report, that there was no question of accidental death because Vanitha's clothes had the kerosene residue on the same.

9. P.Ws 1 and 2 being the mother and brother of the deceased respectively claimed that they had been unable to give Vanitha three sovereigns of gold as promised and there used to be quarrel between Vanitha and the second accused on that account and that on the fateful day both of them hearing the din at about 8.00 p.m. rushed to the house of the deceased and found that she was ablaze and that both the accused ran away from the house. Very strangely enough they again filed a memo before the court that they wanted to be examined again as they then wanted to reveal the truth. It was obvious that later on they were won over.

10. Relying on the evidence of the witnesses, evidence of the Judicial Magistrate, who recorded the dying declaration, and the evidence of the doctor and accepting the dying declaration (Ex.P-14), the trial court has convicted the appellants for the offence as stated above. We have to see the correctness of the conviction in this appeal.

11. In support of the prosecution, the relation witnesses were examined, they being Mangalam (P.W.1), mother of the deceased; Madhavan (P.W.2), elder brother of the deceased and Vijayasundaram (P.W.3), younger brother of the deceased. Out of these witnesses, the evidence of P.W.3 is of no use because he does not speak either of the strained relationship between the mother-in-law and the daughter-in-law on account of the dowry demand nor does he refer to the actual incident because obviously he was not present in the scene when the incident took place.

12. P.W.1 Mangalam, who is the mother of the deceased,

suggests that hearing the scream, she immediately rushed to the Vanitha's house and saw her daughter ablaze. She also deposed that accused 1 and 2 ran from the house. Even before that she has referred to the demand of three sovereigns of gold and her daughter, viz. deceased Vanitha pestering her about the same. In the similar vein is the evidence of Madhavan (P.W.2). He also refers to the fact that he was attracted because of the shrieks of Vanitha and his mother and, therefore, he came on the spot and saw the accused persons running away. This evidence was tried to be relied upon by the prosecution to suggest that though it was the basic duty of the accused persons to do something to save the burning Vanitha, they took to their heels and suggested their immediate conduct which was of highly suspicious nature. According to the prosecution, the two accused persons had nothing to be afraid of it was a case of suicide or accident. There has been an effort on the part of the prosecution firstly to suggest that the door was tried to be locked by the second accused. However, we do not think that can be accepted and that appears to be a mere exaggeration on the part of the witness because the door was not found chained or locked from outside, to the police officers who went there. It is nobody's case that some one opened the door and rescued Vanitha. These two witnesses as well as the other witnesses, viz. Durairaj (P.W.4) and Balan (P.W.5) deposed that Vanitha was seen outside the house who was helped by these witnesses by putting a blanket on her body. There can be no dispute that the first accused and his mother were in the house because that was the most natural place for them to be. It can also not be disputed that when Vanitha was ablaze, these two persons went away. There is very little cross-examination on the question of the accused running away from the spot. Though there are some discrepancies, the evidence of these persons to the effect that there was nobody in the house when they went and that the accused persons had run away can be safely accepted. It has to be remembered in this behalf that it was only about 8.00 p.m. at that time and Vanitha, her child and the two accused persons were the only residents of that house. The evidence of the neighbours also can be seen in this behalf.

13. This, however, takes us to the case of the prosecution that Vanitha was being often tortured or illtreated on account of the dowry demand. It cannot be disputed that the two witnesses i.e. P.W.1 and P.W.2 did speak about the fact that there was an agreement that they would give four sovereigns of gold and they h ad not been able to keep their promise. It also has come in the evidence that there used to be frequent quarrel between the mother-in-law and the deceased Vanitha on account of this demand of three sovereigns of gold. The real question is posed because of the subsequent somersault taken by the witnesses and more particularly P.Ws 1 and 3 who, after their examination was over, came before the court with the affidavits and sought to tell the truth. We do not know as to why they were allowed to be examined later on because that was clearly not permissible. Once the examination of the witness was over and once he had also put his signature in token of the evidence being correct, there was no question of the witness being put again for the purpose of telling the truth. It was not as if the court had felt the necessity of recalling these witnesses nor there was an application by the prosecution for their recall. There can be no doubt that witnesses can be recalled for good reasons even by the prosecution for the further cross-examination. But, here was a case where the witnesses came,

insisted before the court that what they have stated earlier was not the truth and that there was no dowry demand nor were there any misunderstanding or quarrel between the second accused and the deceased. We are unable to accept all these. It has definitely come in the evidence that the dowry was demanded only by the second accused and the quarrel also used to be between the second accused and the deceased Vanitha. Nobody has said anything about the positive act on the part of the first accused in respect of demand of dowry. Learned counsel for the defence tried to suggest that this demand of dowry was a story cooked by the witnesses and more particularly the mother and brother of the deceased but that is not where it stops. In fact, Balan (P.W.5) had also referred to the bickering in the house of the deceased on account of the dowry demand. He has also particularly referred to the bickering between the second accused and the deceased only. It is a clear case where a married, pregnant lady was being pestered for dowry and subjected to death by burning. In our opinion, therefore, the trial court was right in holding that the second accused had inflicted cruel treatment. In this connection, we shall refer to the dying declaration in the succeeding paragraphs.

14. In so far as the offence under Sec.302 I.P.C. is concerned, we will have to go by the dying declaration of Vanitha where it is stated in the clearest possible terms by Vanitha that it was her husband who doused her with kerosene and set her ablaze with the aid of a burning lamp. The dying declaration was subjected to a very severe criticism by the learned defence counsel. The learned defence counsel points out that there were major defects not only the dying declaration (Ex.P-14) recorded by the Judicial Magistrate but also in the evidence of the Judicial Magistrate Arumugham (P.W.14) and Dr. Thambiran (P.W.8). According to the learned counsel, reading the evidence as it is, the dying declaration was bound to be rejected or at any rate, the conviction based upon the dying declaration could not be sustained.

15. There can be no dispute that the dying declaration was in fact recorded by the Judicial Magistrate First Class. He had received the requisition on the same night from Valparai hospital and, therefore, he went to record the dying declaration. In his evidence he says that the recording of the dying declaration started at 1.00 a.m. and ended on 1.15 a.m. on 27-10-1994. In his cross-examination, he was made to say that he did not record in particular that Vanitha was in a fit state of mind and was in a condition to give the statement. The reason he ascribe to this is that he himself was satisfied about the fitness of Vanitha to give the statement that therefore he recorded the statement. When we go to the first part of the dying declaration, it is clear that the Judicial Magistrate had asked her a few questions about her name, her husband’s name, address, etc., which she correctly answered. He then had put a very specific question to the deceased as to whether she was conscious and whether she was in a fit state of mind. Those questions are to be found part of the dying declaration. It cannot, therefore, be said that the Magistrate did not try to form his own opinion and did not try to get ascertained about the fitness of the deceased to give the statement. As if all this is not sufficient, a court-question came to be asked to this witness whether the doctor was present while he was recording the dying declaration. The witness has given a clear answer that the medical

officer was present and he had also endorsed that she was in the sound state of mind and had affixed his signature. Perhaps, this was felt necessary because the Public Prosecutor seems not to have put a specific question to the doctor in his examination-in-chief and had merely got the dying declaration proved by reference to the fact that it was he who had got recorded the dying declaration. The alacrity shown by the court is exemplary and it is obvious that the doctor was present when the dying declaration was recorded and not only was he present but he also endorsed that Vanitha was in the sound state of mind at the time of recording of the dying declaration. We have seen the document ourselves to see that there indeed is the signature of the doctor on that statement and it was specified therein that she was in a fit state of mind. The witness was again and again asked about the presence of the doctor in the cross-examination but he seems to have insisted upon that the doctor was very much present and in fact he was already there when he reached the hospital to record the dying declaration. A suggestion to the effect that the medical officer was not present when he was recording the dying declaration is specifically denied by the witness. Our attention was drawn at the evidence of Dr. Thambiran (P.W.8) who spoke about the entry of Vanitha to the hospital. To him also, on his enquiries, Vanitha seems to have stated that she was burnt by her husband by pouring kerosene on her. To him she also stated that the incident took place inside the house. He also insisted that she had given proper answers to his questions with consciousness. Her pulse was nearly normal and her blood pressure was also 110/8 0 (which is a near normal rate). She also found to be pregnant for four months. The doctor deposed that she had suffered 80% of burn injuries. This witness was again called and his examination-in-chief was continued. He also pointed out that it was he who informed to the police and Judicial Magistrate and the intimation to the police. He also deposed about Rajendran, first accused, having come to him on the same day at about 11.00 p.m. and having made a statement that his wife attempted to commit suicide by setting herself ablaze and when he tried to save her, he had suffered burn injuries which he has already deposed about. Very strangely, however, the doctor does not depose about his being present and having endorsed the dying declaration recorded by the Judicial Magistrate in his presence. It is really pathetic that the Public Prosecutor should not have bothered to put the dying declaration to this witness which bore his signature and which was in possession all through of the prosecution. It is really again completely inexplicable as to why this witness was not asked a single question about the Judicial Magistrate having recorded the dying declaration. It will be seen that the evidence of Judicial Magistrate was recorded on 17-12-1996 while this witness was examined earlier, i.e. on 5-12-1996. The Public Prosecutor perhaps thought that he could prove the dying declaration only through the evidence of the Judicial Magistrate and, therefore, the dying declaration was not required to be put to this doctor. Such incompetent handling of the sessions trial really causes consternation and we express our deep anguish at this. It has come in the cross-examinati on of the doctor that at about 12.00 midnight the police came for the first time and that they came to the hospital after the Judicial Magistrate recorded the dying declaration of Vanitha. It was only in the cross-examination that the doctor deposed that he was present in the hospital when Vanitha was brought to the hospital. The doctor, however, very clearly stated that Vanitha spoke in a crystal clear manner without giving room for

any doubt. The evidence of this doctor was very heavily criticised that he should not have spoken one word about the fact of his being present and having certified about the fitness of Vanitha at the time of recording her dying declaration. There can be no doubt that the defect is serious. However, it will have to be seen whether it has really affected the prosecution case.

16. For this purpose, when we go to the dying declaration, we see that Vanitha, who was pregnant, has clearly referred to the persons present in the house. She also made a reference to the bickering over dowry between her and the second accused. She has also held her mother-in-law, second accused, responsible for the incident and she has also gave a graphic description of the manner in which she was burnt by her husband. Reading the dying declaration as it is, there can be no dispute that it was the first accused and first accused alone, who doused Vanitha with kerosene and set her ablaze. In our opinion, the Judicial Magistrate had taken full care not only to get himself assured about the fitness of Vanitha but he also got the endorsement of the doctor at the end of the dying declaration. We have seen that endorsement ourselves and we are convinced that the endorsement was made at the time it is purported to have been done. True it is that at the beginning of the dying declaration, there is no such endorsement by the doctor. However, it is clear that the Judicial Magistrate has asked Vanitha few questions to know about the fitness of her mind to give dying declaration, which has been put at the end of the dying declaration. In our opinion,

therefore, the dying declaration can be given credence though the doctor has not deposed before the court about the endorsement made and about the fitness of Vanitha to give dying declaration.

17. Learned counsel very severely assailed the evidence and questioned that the recording of the dying declaration and the mental and physical condition of Vanitha to give dying declaration were highly suspicious matters particularly because the doctor had not given any data like her pulse rate, blood pressure readings, etc. and the prosecution had also not produced any material regarding the treatment given to her. There can be no doubt that there is a serious flaw in this case as the doctor has not been asked at all by the Public Prosecutor about the condition of Vanitha nor has he been asked about his own endorsement made on the dying declaration. However, it cannot be disputed that the doctor was all through present when the dying declaration was recorded which was the claim of the Judicial Magistrate, who had nothing to do and who is most disinterested witness. In this behalf, it has to be seen that the evidence of the doctor supports in a way the case that it was the first accused who had set ablaze his wife because the doctor has very clearly stated about the same in his evidence and there is absolutely no challenge to this version. On the other hand, the doctor was clear enough to say that Vanitha was speaking in a crystal clear manner and that she had blamed her husband for burning her. It will be seen that even if the dying declaration is to be tested, Vanitha has not made any conflicting version. Before the doctor also, she blamed her husband by naming him as the perpetrator of the crime and though in the dying declaration given before the Judicial Magistrate she said that her mother-in-law was responsible for this,

she has very specifically stated that it was her husband (first accused) who had set her ablaze. This suggests not only the clear mind of Vanitha at the time when she made the statements but also the intrinsic truthfulness of the dying declaration. It is obvious that the bickering of Vanitha was with her mother-in-law, the second accused, who was pestering her for the dowry and not her husband. It has become clear on account of the fact that Vanitha has very specifically suggested that for the debacle her mother-in-law was responsible. However, that does not absolve the first accused, who set her ablaze. The clarity of mind of Vanitha is also disclosed from the fact that even in that state she suggested that her child should be sent to her parents. All this gives the ring of truthfulness to the dying declaration and for the reasons which we have given earlier, we can also vouchsafe about the ability of Vanitha to make a dying declaration.

18. Learned counsel also tried to suggest that the deceased was in company of her parents and they must have tutored Vanitha to give a false statement. We are unable to accept this because, there is no such suggestion that Vanitha's parents were with her at the time when the dying declaration was recorded. In fact, not a single question was directed to the doctor or the Judicial Magistrate about the presence of the witnesses like P.Ws 1, 2 and 3 at the time when the dying declaration was recorded. Seeing the dying declaration, we are quite convinced that it was truthful, voluntary and was made in a state when the maker thereof was perfectly conscious. It is, therefore, that even when the doctor's evidence in so many specific words about the fitness of Vanitha is not before us, we would venture to accept the evidence of the doctor. The law of dying declaration has now been settled in the recent decision of the Supreme Court in LAXMAN v. STATE OF MAHARASHTRA (2002 (6) SC 313) . The constitution-Bench decision goes on to say that the decision in Paparambaka Rosamma & Others v. State of Andhra Pradesh (JT 1999 (6) SC 585) was not a correct decision while the decision rendered in Koli Chunilal Savji v. State of Gujarat (JT 1999 (7) SC 568) was correctly decided. The Supreme Court holds:
"What is essentially required is that the person who records a dying declaration must be satisfied that the deceased was in a fit state of mind. Where it is proved by the testimony of the magistrate that the declarant was fit to make the statement evenwithout examination by the doctor the declaration can be acted upon provided the court ultimately holds the same to be voluntary and truthful. A certification by the doctor is essentially a rule of caution and therefore the voluntary and truthful nature of the declaration can be established otherwise."
We are of the clear opinion, for the reasons given above, that this was a dying declaration which inspired full confidence of the Court in its truthfulness and credence. We have been alive to the fact that the doctor though was available has not specifically asked about the condition of the victim to make the dying declaration but, even otherwise, the evidence of the doctor and the evidence of the Judicial Magistrate is enough to suggest that the deceased was in a fit mental condition to make the dying declaration.

19. Learned counsel for the defence almost by way of a desperate attempt tried to suggest that the first accused could not be

convicted for an offence under Sec.302 I.P.C. and the offence would be in the nature of Sec.304 Part II. Learned counsel for this purpose relied on a reported decision in KALU RAM v. STATE OF RAJASTHAN (2000 SCC (Crl.) 86). When we see the facts of the reported decision, the difference in the scenario is crystal clear. In the reported decision, the appellant was drunk and he demanded his wife her ornaments possibly to get more drunk. On her refusal, he burnt her alive by pouring kerosene over her and setting her ablaze. The Supreme Court accepted the dying declaration. Curious enough, in the reported decision, the deceased herself told the witnesses that she had herself committed suicide. However, that portion of the evidence of the witness was rejected more particularly on the backdrop of the dying declaration. The Supreme Court has mentioned the following reasons to bring down the offence from Sec.302 I.P.C. to Sec.304 Part II:

"But then, what is the nature of the offence proved against him? It is an admitted case that the appellant was in a highly inebriated stage when he approached the deceased when the demand for sparing her ornaments was made by him. When she refused to oblige he poured kerosene on her and wanted her to light the matchstick. When she failed to do so he collected the matchbox and ignited one matchstick but when the flames were up he suddenly and frantically poured water to save her from the tongues of flames. This conduct cannot be seen divorced from the totality of the circumstances. Very probably he would not have anticipated that the act done by him would have escalated to such a proportion that she might die. If he had ever intended her to die he would not have alerted his senses to bring water in an effort to rescue her. We are inclined to think that all that the accused thought of was to inflict burns to her and to frighten her but unfortunately the situation slipped out of his control and it went to the fatal extent. He would not have intended to inflict the injuries which she sustained on account of his act. Therefore, we are persuaded to bring down the offence from first degree murder to culpable homicide not amounting to murder.
We are afraid, we cannot see any similarity in the present prosecution story. Here was a case where the accused instead of trying to rescue his wife actually ran away from the house. His escapade had been deposed to by the witnesses who are both relative and non-relative witnesses. True it is that the accused has stated that he attempted to save his wife but, there is nothing to suggest that he tried to save her and it was during those efforts that the accused got burns. Merely because the accused had burn injuries cannot support his version that he tried to rescue his wife from the tongues of fire. It could be that after setting Vanitha ablaze, the deceased might have clasped him as she could not have otherwise clasped her mother-in-law or the child. There is nothing to suggest even in the dying declration that the accused did anything to save Vanitha from the tongues of fire. On the other hand, the accused had actually run away from the scene. We have disbelieved the prosecution version that the accused tried to lock her inside but that does not help the accused because in the reported decision, the Supreme Court has clearly commented upon the intention of the accused merely to frighten her by inflicting burns. That does not seem to be the case here. We are, therefore, unable to accept the plea that the offence can be brought down to Sec.304 Part II.

20. It is thus a pathetic story of the accused 1 and 2 tormenting the deceased Vanitha on account of the dowry, pestering her all through and ultimately Vanitha being subjected to the torture of being burnt alive. Vanitha was a young married girl, having a child. She was pregnant for four months. However, the accused persons did not even think about her peculiar physical condition. In our opinion, the trial court has correctly convicted the first accused of the offence under Sec.302 and the second accused of the offence under Sec.498-A I. P.C.

21. We do not see any merit in the appeal and would choose to dismiss the appeal. The appeal is accordingly dismissed.

Index:Yes
Website:Yes

Jai

To:

1. The Sessions Judge, Comibatore

2. The District Collector, Coimbatore

3. The Superintendent of Central Prison, Coimbatore

4. The Public Prosecutor, High Court, Madras

5. Inspector General of Police, Chennai-4